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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

LONG DISTANCE SERVICE OF WASHINGTON, INC. and RICHARD J. RICE,
Petitioners,

v.

MID ATLANTIC TELECOM, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a business competitor transform the alleged mail and wire fraud of another business against its customers into a RICO action merely by alleging anticompetitive intent?

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Petitioners Long Distance Service of Washington, Inc. and its President, Richard J. Rice, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on March 3, 1994.[1]

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[1] Petitioner Long Distance Service of Washington, Inc., which was listed in the caption in the court below as "Long Distance Services, Incorporated, a/k/a Long Distance Service of Washington, Incorporated," has no parent or subsidiaries.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 18 F.3d 260 and is printed at Appendix A hereto, App. 1a-10a. On March 17, 1994, petitioners filed a petition for rehearing and suggestion of rehearing en banc, which was denied over three dissents on April 21, 1994. A copy of the denial of that petition is printed at Appendix D hereto, App. 14a-15a.

The memorandum of the United States District Court for the District of Maryland dated March 10, 1993 (Kaufman, J.) is printed at Appendix B hereto, App. 11a-12a. A revised order entered by the district court on March 21, 1994 is printed at Appendix C hereto, App. 13a.

On July 6, 1994, Chief Justice Rehnquist signed an order extending the time for filing a petition for writ of certiorari up to and including August 19, 1994. A copy of that order is printed at Appendix E hereto, App. 16a.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on March 3, 1994. App. 1a-10a. On April 21, 1994, the court denied petitioners' request for rehearing and suggestion of rehearing en banc. App. 14a-15a. On July 6, 1994, Chief Justice Rehnquist extended the time for filing the writ of certiorari up to and including August 19, 1994. App. 16a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This case arises under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"). Relevant provisions of the RICO statute are printed at Appendix F hereto, App. 17a-18a. The predicate acts alleged are mail and wire fraud in violation of

18 U.S.C. §§ 1341 and 1343 respectively. These provisions are printed at Appendix G hereto, 19a-20a.

STATEMENT OF THE CASE

In February 1992, Mid Atlantic Telecom, Inc., a reseller of long distance telephone services to business customers in the Bell Atlantic region, brought a RICO action against petitioner Long Distance Service of Washington, Inc. ("LDS"), another long distance service provider.[2] Mid Atlantic alleged that from 1986 to 1991 LDS committed acts of mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343 by randomly and covertly adding time to the long distance calls of its customers as to increase the cost of the calls and the resulting revenue to LDS. The district court thus had jurisdiction pursuant to 18 U.S.C. § 1961 and 28 U.S.C. § 1331.

More specifically, Mid Atlantic alleged that LDS carried out its fraudulent billing scheme

> through repeated acts of wire and mail fraud by contacting customers of Mid Atlantic through the U.S. mails, and through interstate telephone calls to solicit said customers to switch from Mid Atlantic to LDS, in violation of 18 U.S.C. §§ 1341 and 1343, by falsely offering those customers what were said to be lower rates than that offered by Mid Atlantic.

Amended Complaint ¶ 23. Further acts of mail fraud were allegedly committed when LDS sent its bills to its customers, *id.* ¶ 28, and when LDS used the mails to advertise its fraudulent rates to potential customers. *Id.* ¶ 27. Mid Atlantic also alleged state law claims of tortious interference with contractual and business relationships

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[2] Regional resellers buy time on transmission lines owned by the larger carriers such as AT & T, Sprint and MCI. Because the resellers are not subject to the same tariffs, they can then sell long distance service to customers under economical and custom-built service and rate plans. App. 2a.

and unfair competition. *Id.* ¶¶ 39-40, 45.[3] However, Mid Atlantic did *not* allege that it was itself bilked by the allegedly fraudulent phone rates.

LDS moved to dismiss the complaint on the basis, *inter alia,* that the case of *Holmes v. Securities Investor Protection Corp.,* —— U.S. ——, 112 S. Ct. 1311 (1992), established a requirement of proximate cause that was not satisfied in this case. Because Mid Atlantic was admittedly not defrauded by LDS' mailing, LDS' conduct could not have proximately caused Mid Atlantic's injury. In response, Mid Atlantic amended its claim to allege for the first time that LDS' conduct was intended to harm Mid Atlantic by causing it to lose customers or revenue to LDS. LDS then filed a motion to dismiss or for summary judgment on the basis that RICO does not apply to mail and wire fraud alleged by third parties whose alleged injuries are not proximately caused by the defendants' conduct. LDS also maintained that plaintiffs who admit, as Mid Atlantic had, that they have full knowledge of the allegedly fraudulent practice cannot demonstrate the element of reliance necessary for a RICO action based on mail fraud.

After the district court granted summary judgment for LDS, agreeing that Mid Atlantic could not establish proximate cause, App. 11a-12a, the Court of Appeals for the Fourth Circuit reversed. The court recognized that it had previously concluded that " 'a cause-in-fact connection, standing alone, does not suffice to establish liability' " under RICO. App. 7a (quoting *Brandenburg v. Seidel,* 859 F.2d 1179, 1189 (4th Cir. 1988)). It further acknowledged that a plaintiff must also demonstrate proximate cause, or "a nexus between the proscribed acts and the injuries." App. 8a. In addition, the court acknowledged that " 'to establish injury to business or property "by reason of" a predicate act of mail fraud within the meaning

[3] It should be emphasized that LDS accepts these allegations as true only for purposes of this petition.

of § 1964(c),'" a RICO complainant must demonstrate detrimental reliance on the alleged fraud. App. 10a (quoting *Brandenburg*, 859 F.2d at 1188 n.10) (citation omitted in original).

There was no question that the direct victims of the alleged scheme to artificially inflate telephone bills were the customers. App. 8a. But because Mid Atlantic further alleged that the fraudulent billing scheme was intended to injure Mid Atlantic, the court concluded that "[d]iscovery might or might not reveal that the artificially low billings were purposefully devised to lead to harm to Mid Atlantic." App. 8a. The court therefore reversed and remanded the case for further factual development without reaching the reliance question. App. 9a-10a.

REASONS FOR GRANTING THE WRIT

It is not sufficient for a RICO plaintiff to show that prohibited conduct is only the "but for" cause of the injuries alleged. *Holmes v. Securities Investor Protection Corp.*, —— U.S. ——, 112 S. Ct. 1311, 1316-17 (1992). Because Congress never intended for all factually injured plaintiffs to recover under RICO, courts have "overwhelmingly" concluded that a RICO plaintiff must also establish proximate cause. *Id.* at 1317 n.11, 1318. The Court of Appeals for the Fourth Circuit was among those that imposed this requirement on RICO plaintiffs even before *Holmes* removed all doubt on the subject. *See Brandenburg v. Seidel, supra.*

Unfortunately, the lower courts have not been nearly as uniform in their notions of what proximate cause entails. "'[D]espite the manifold attempts which have been made to clarify the subject [of proximate cause, there is not] yet any general agreement as to the best approach,' either in torts or as applied to RICO." *Sperber v. Boesky*, 849 F.2d 60, 64 (2d Cir. 1988) (citation omitted) (alteration in original). However, this Court has clarified that the primary consideration in this analysis is the directness of the relationship between the injurious conduct

and the harm sustained. *Holmes,* 112 S. Ct. at 1318. In the present case, the district court, relying on *Holmes,* entered summary judgment against plaintiffs on the basis of their failure to show proximate cause. App. 11a-12a. The court of appeals, in contrast, concluded that Mid Atlantic was entitled to discovery as to whether LDS' conduct was intended to injure Mid Atlantic and whether Mid Atlantic had relied to its detriment on the alleged fraudulent billing scheme. App. 8a-10a.

In both these determinations, the appellate court erred. The predicate acts alleged are the use of the mails and wires to commit a fraud. More precisely, LDS is charged with using the mails and wires to solicit potential customers, to submit artificially inflated phone bills to existing customers, and to advertise its fraudulent rates through direct mail and magazine ads. Mid Atlantic has also alleged that the customers thus targeted "reasonably relied on LDS's representations that it was offering lower rates than that offered by Mid Atlantic." Amended Complaint ¶ 24.

These allegations, plainly, are directed exclusively toward the users of long distance service, the customers. There are no allegations that LDS intended to deceive Mid Atlantic or that Mid Atlantic was defrauded by the fraudulent billing practice. Mid Atlantic's injury is contingent on how the customers acted in response to the predicate offense—and to myriad other market factors.[4]

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[4] The court below recognized that the causal chain was broken by the intervening action of the solicited customers. App. 7a-8a. These customers could have chosen to do business with LDS for a reason other than its price (*e.g.,* name recognition, recommendations from other users, specialized service or rate schedules), or could have decided against Mid Atlantic for a reason other than its price (*e.g.,* nature of services required, dissatisfaction with service rendered). In either case, where the injuries would be "more appropriately attributable to intervening causes that were not predicate acts under RICO, the RICO action could not lie." App. 7a. Yet the court declined to rule on that basis, finding that

Whether or not LDS intended its alleged fraud on its customers to also harm Mid Atlantic competitively, the injury sustained is not directly caused by the conduct alleged. Mid Atlantic's injury is a byproduct, whether intended or not, of the injury to the customers.

The court below, appearing somewhat skeptical of the claim, nevertheless determined that Mid Atlantic was entitled to discover whether LDS intended its scheme to "lead to harm to Mid Atlantic." App. 8a. Discovery will not advance this inquiry, however, because proximate cause is more a matter of policy than of underlying facts. As such, it is a question of law for the court. *Brandenburg*, 859 F.2d at 1189.[5]

As a matter of law, RICO, as construed by this Court, requires a cognizable connection between the offending acts and the claimed injury. In this case, where the claim is based on the mail and wire fraud statutes, the predicate acts can be established only if Mid Atlantic can show that LDS engaged in a scheme to defraud, that it used the mails and wires in furtherance of the scheme, and that it acted with the specific intent to defraud. *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 991 (8th Cir. 1989); *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1400 (9th Cir. 1986); *United States v. Brien*, 617 F.2d 299, 307 (1st Cir.), *cert. denied*, 446 U.S. 919 (1980). Without the element of deceit, there is no mail fraud. *See, e.g., United States v. Brien, supra; United States v. Bohonus*, 628 F.2d 1167, 1172 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980); *United States v. Kreimer*, 609 F.2d 126, 128 (5th Cir. 1980).

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the customers' intervening acts were not "wholly independent of the alleged predicate acts." App. 8a. For reasons discussed herein, the court did not carry its analysis far enough.

[5] For that reason, the court in *Brandenburg* properly concluded as a matter of law that plaintiffs there had not been injured "by reason of" the alleged predicate acts of sending misrepresentations through the mail. 859 F.2d at 1189-90.

According to Mid Atlantic's own allegations, LDS' intent was to deceive its customers, not its competitors. Mid Atlantic further alleged that the customers—not Mid Atlantic—reasonably relied on LDS' misrepresentations. Thus, in its own allegations Mid Atlantic fails to place itself within the "zone of interest" of a RICO claim based on mail or wire fraud. *Holmes,* 112 S. Ct. at 1328 (Scalia, J., concurring).

It is true that Mid Atlantic has alleged that one of the underlying purposes of LDS' scheme was to steal Mid Atlantic customers and to otherwise corner the market. But unfair competition of that nature, however unacceptable it is deemed under state law, is not prohibited by the federal mail fraud statute. "[N]ot every use of the mails or wires in furtherance of an unlawful scheme to deprive another of property constitutes mail or wire fraud." *McEvoy Travel Bureau v. Heritage Travel,* 904 F.2d 786, 791, 792 n.9 (1st Cir.), *cert. denied,* 498 U.S. 992 (1990).[6] Instead, "only a scheme to obtain money or other property from the victim by fraud violates § 1341." *United States v. Walters,* 997 F.2d 1219, 1227 (7th Cir. 1993). "Losses that occur as byproducts of a deceitful scheme do not satisfy the statutory requirement." *Id.* Nor is unfair competition prohibited by any other RICO predicate act.

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[6] The decision in *McEvoy* is applicable to this case. In that case, the McEvoy Travel Bureau alleged that a client used the mails to obtain regulatory approval for a phony contract with another travel agent to which the client intended to transfer its business in breach of its contract with McEvoy. The court acknowledged that this use of the mails "may have been part of a general plan having as its object the transfer of [the client's] business to [the competitor], leaving McEvoy bereft of its major client." 904 F.2d at 793. It concluded nonetheless that this did not constitute mail fraud because the complaining party was not made "the object of an act of mail or wire fraud." *Id.* at 794. The "effective reach of the deception" did not extend to the plaintiff. *Id.*

Moreover, virtually any time a business does commit one of RICO's predicate acts, it can be assumed it hopes to enrich itself instead of its competitors, or even at the expense of its competitors. *See Lancaster Community Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 406 (9th Cir. 1991) (holding that defendant who attempted to increase market share and steal customers nonetheless did not commit mail fraud or RICO violation), *cert. denied*, —— U.S. ——, 112 S. Ct. 2268 (1992). That, simply put, is the nature of business. RICO does not, and was never intended to, prohibit anticompetitive conduct, even in its more virulent forms, without more. RICO was aimed at a different evil.

If a competitor is to recover under RICO, he must show that he was injured "by reason of" the predicate acts of racketeering activity that constitute violations of section 1962, or, in legal shorthand, that his injuries were proximately caused by the conduct that RICO prohibits. *Holmes*, 112 S. Ct. at 1316-18. This Court established proximate cause as the mechanism that separates a federal RICO action from the myriad garden variety claims that constitute unfair competition or interference with business relationships under state law. If that element is not strictly applied, it will be impossible to restrain the use of RICO suits by business competitors.

The mail and wire fraud statutes in particular threaten to federalize all such claims because "all modern business transactions entail use of the mails or wires," *Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1025 (7th Cir. 1992), and are certain to do so increasingly with the technological evolution of facsimile machines and nationwide computer networks. The mail and wire statutes will provide just the "jurisdictional hook," *id.*, needed to federalize any such business tort and open the door to treble damages. There is likely to be no greater source of abuse of the civil RICO statutes in the foreseeable future. *Id.*

The court below failed to properly employ the critical mechanism of proximate cause as set forth in *Holmes* or to realize that the anticompetitive intent that Mid Atlantic belatedly alleged cannot bridge the gap between the alleged predicate acts of mail and wire fraud on the customers and the loss of business or revenue to Mid Atlantic. This case thus presents the Court with the occasion to clarify the teachings of that case and to stem the tide of civil RICO actions that threaten to overwhelm its intended purpose.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should issue a writ of certiorari to reverse the decision of the Court of Appeals for the Fourth Circuit on the ground that it conflicts with the precedents of this Court and, in particular, with the decision of this Court in *Holmes v. Securities Investor Protection Corp.*, —— U.S. ——, 112 S. Ct. 1311 (1992).

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 93-1458

MID ATLANTIC TELECOM, INCORPORATED,
Plaintiff-Appellant,

v.

LONG DISTANCE SERVICES, INCORPORATED, a/k/a Long Distance Service of Washington, Incorporated; RICHARD J. RICE,
Defendants-Appellees.

Argued Oct. 26, 1993
Decided March 3, 1994

Before WILKINS and WILLIAMS, Circuit Judges, and SPROUSE, Senior Circuit Judge.

OPINION

SPROUSE, Senior Circuit Judge:

Mid Atlantic Telecom, Inc. (Mid Atlantic) instituted this civil action against Long Distance Services, Inc. (LDS), charging LDS and its president, Richard Rice, with violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962(a) and (c), and conspiracy to violate those sections under § 1962 (d). Mid Atlantic also brought state law claims of unfair competition and tortious interference with its contracts

and business relationships. After LDS filed a motion to dismiss Mid Atlantic's complaint, Mid Atlantic submitted an amended complaint. Without allowing the plaintiff the opportunity to engage in discovery, the district court granted summary judgment in favor of the defendants. In a revised order, the district court declined to exercise jurisdiction over the plaintiff's state law claims and dismissed them without prejudice. Mid Atlantic appeals the grant of summary judgment, complaining particularly about the court's decision to grant summary judgment prior to discovery.

I

Mid Atlantic and LDS are resellers of long-distance telecommunications services in the mid-Atlantic region of the United States. As resellers, they purchase time wholesale on the transmission lines of common carriers, such as AT & T, Sprint, and MCI, and then sell that time to customers. Because resellers are able to purchase time from common carriers at a rate below tariff, they can offer customers lower rates and can develop specialized services and rate plans for their clients. The market shares for regional resellers are limited, and Mid Atlantic and LDS have less than one percent of the long-distance market in their region.

Resellers, like other long-distance telephone service providers, charge their customers on a per minute basis. The rate may fluctuate according to the time of day during which calls are placed or the distance between callers. In order to register this information, telephone companies rely on complicated switching equipment and billing software. During one weekend in 1986, an employee of defendant LDS neglected to turn on certain switching equipment. As a result, LDS was unable to record any data regarding use of its transmission lines. When the error was discovered, Richard Rice, the president of LDS, instructed Henry Luken, an employee of the

firm, to develop a program to recoup the losses. Luken created a computer program that randomly added minutes to the calls of LDS customers. By artificially inflating the lengths of calls, LDS was able to charge excessive prices and recover its losses from the weekend in 1986.

Mid Atlantic asserts that LDS did not eliminate the fraudulent billing scheme after it had compensated itself for the losses of the one weekend. Instead, Rice allegedly insisted that LDS employees continue to use the inflated billing program to offer artifically lower rates to new customers and entice Mid Atlantic customers to sign up with LDS.[1] In practical effect, however, the quoted rates were not lower, since additional minutes were randomly and artificially added to the lengths of telephone calls. The fraudulent billing scheme apparently ceased in 1991 when the Federal Bureau of Investigation served a search warrant on LDS's offices.

In its amended complaint filed on April 13, 1992, Mid Atlantic alleged that LDS and its president violated §§ 1962(a) and (c)[2] of RICO and conspired to violate

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[1] At oral argument, counsel for LDS conceded, for purposes of this appeal, that LDS fraudulently solicited customers by randomly assigning more time to telephone calls made through LDS.

[2] Section 1962(a) states:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(a).

Section 1962(c) states:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which

those sections in contravention of § 1962(d)[3] of RICO. In support of these claims, Mid Atlantic accused LDS and Rice of engaging in a pattern of racketeering activity by fraudulently using the mails and telephone wires to solicit customers of Mid Atlantic in violation of 18 U.S.C. §§ 1341 and 1343. According to the complaint, LDS's billing scheme enabled it to offer artificially low rates which forced Mid Atlantic to match LDS's low rates or lose its customers. Because of these lost revenues and customers, Mid Atlantic claims that it meets the injury requirement of § 1964(c)[4] of RICO and has standing to sue.

The district court first ruled as a matter of law that LDS and its president Rice did not enter into a conspiracy. This ruling is not contested on appeal. The court then, without allowing discovery, granted summary judgment in favor of LDS on the ground that the activities conducted by LDS could not have been the proximate cause of Mid Atlantic's injuries under the Supreme Court's ruling in *Holmes v. Securities Investor Protection Corp.*, —— U.S. ——, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992). Mid Atlantic consequently pursued this appeal.

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affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c).

[3] Section 1962(d) states: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." 18 U.S.C. § 1962(d).

[4] Section 1964(c) states: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c).

II

Our review of a district court's grant of a motion for summary judgment is *de novo*, employing the same standards applied by the district court. *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1127-28 (4th Cir.1987). Under those standards, the non-movant, in order to prevail, must produce sufficient evidence to create a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). The district court's decision denying Mid Atlantic's request to conduct discovery is subject to review under the abuse of discretion standard. *See Cohen v. Bond*, 953 F.2d 154, 157 (4th Cir.1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 3057, 120 L.Ed.2d 922 (1992).

In *Holmes*, —— U.S. at ——, 112 S.Ct. at 1311, the Supreme Court addressed the causation requirements of § 1964(c) of RICO. It held that the same causation principles discussed in *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), are implicated in § 1964(c). *Holmes*, —— U.S. at ——-——, 112 S.Ct. at 1317-18. In *Associated Gen. Contractors*, the Supreme Court examined the causation requirements of section 4 of the Clayton Act.[5] Under that statute, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor. . . ." 15 U.S.C. § 15(a). The Court concluded that the appropriate inquiry to determine whether a plaintiff was injured "by reason of" a violation of the antitrust laws was the same as the common law test for determining proximate causation. *Associated Gen. Contractors*, 459 U.S. at 535-36, 103 S.Ct. at 907-08.

Confronting the identical "by reason of" language in the RICO context, however, the *Holmes* Court cautioned

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[5] 15 U.S.C. § 15.

against an overly expansive view of proximate cause: "[A] plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover." *Holmes,* —— U.S. at ——, 112 S.Ct. at 1318. In *Holmes,* the Securities Investor Protection Corp. ("SIPC") had sued the prepetrators of a stock manipulation scheme to satisfy the claims of customers of broker-dealer firms that had failed in the wake of their purchase of the manipulated stocks.[6] The Court refused to find that the scheme operators' actions were the proximate cause of the investors' injuries: "The broker-dealers simply cannot pay their bills, and only that intervening insolvency connects the conspirators' acts to the losses suffered by the nonpurchasing customers and general creditors." *Id.* at 1319.

In *Holmes,* the Court was particularly concerned with the assertion of the rights of the directly injured targets of the RICO conspiracy by plaintiffs who had only been indirectly injured. The Court reasoned that the broker-dealers were the targets of the stock manipulators' scheme and could be counted on to vindicate their rights. In contrast, the injuries suffered by the broker-dealers' customers were merely derivative of the injuries suffered by the investment firms themselves. "Allowing suits by those injured only indirectly would open the door to 'massive and complex damages litigation [which would] not only burde[n] the courts, but also undermin[e] the effectiveness of treble-damages suits.'" *Id.* at 1321 (quoting *Associated Gen. Contractors,* 459 U.S. at 545, 103 S.Ct. at 912).

In *Brandenburg v. Seidel,*[7] 859 F.2d 1179, 1187 (4th Cir.1988), we pointed out that the "by reason of" lan-

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[6] The SIPC had sued under a common law subrogation theory which was ultimately rejected by the Supreme Court.

[7] *Brandenburg* involved consideration of the causation requirements of § 1964(c) in the context of the collapse of the Maryland Savings-Share Insurance Corporation (MSSIC).

guage in § 1964(c) "requires the plaintiff to make two closely related showings: (1) that he has suffered injury to his business or property; and (2) that this injury was caused by the predicate acts of racketeering activity that make up the violation of § 1962." The plaintiffs in *Brandenburg* sued, among others, the former officers and directors of MSSIC for losses they suffered when the deposit insurance system collapsed. The depositors claimed they were injured by reason of MSSIC mailings that contained misrepresentations about the stability of the Maryland savings and loan industry. We found that the plaintiffs had alleged an attenuated cause-in-fact connection between the defendants' conduct and their injury. *Id.* at 1189.

In affirming the grant of summary judgment in favor of the defendants, we noted that "[s]uch a cause-in-fact connection, standing alone, does not suffice to establish liability. Civil RICO is, of course, a statutory tort remedy—simply one with particularly drastic remedies. Causation principles generally applicable to tort liability must be considered applicable." *Id.* at 1189. In *Brandenburg,* the causal connection was considered too tenuous, and the plaintiffs' theory ignored the more immediate causes of their injuries (i.e., duplicity by the management of savings and loans and failure of MSSIC to prevent those depredations). Where the injuries were more appropriately attributable to intervening causes that were not predicate acts under RICO, the RICO action could not lie. *Id.* at 1190.

LDS and Rice argue that *Holmes* and *Brandenburg* compel the result reached by the district court. Mid Atlantic does not allege that it received mail or telephone solicitations offering artificially low rates, merely that its customers did. LDS and Rice contend that their customers were the only victims of the alleged fraud and only those customers can assert their rights. They further maintain that any injury to Mid Atlantic stemmed from the independent intervening acts of Mid Atlantic customers after LDS's solicitations. It follows, the appellees

argue, that the solicitations could not have been the proximate cause of Mid Atlantic's injuries.

We are unable to agree. In *Brandenburg*, 859 F.2d at 1189, it was recognized that "the legal cause determination is properly one of law for the court, taking into consideration such factors as the foreseeability of the particular injury, the intervention of other independent causes, and the factual directness of the causal connection." *Brandenburg* also explained that proximate causation requires a nexus between the proscribed acts and the injuries. *Id.* at 1187. We did not, however, intend to establish a rule that only injuries suffered by the immediate victim of a predicate act satisfied the "by reason of" requirement of § 1964(c). In conducting the traditional common-law proximate cause analysis, therefore, courts should focus on the temporal and circumstantial relationship between the defendant's conduct and the injury suffered by the plaintiff, and the foreseeability that intervening events would cause injury to the plaintiff. *Id.* at 1189.

In its amended complaint, Mid Atlantic alleges that LDS engaged in fraudulent use of the mails and telephone wires to entice customers away from Mid Atlantic and to eliminate Mid Atlantic as a competitor. Taking the complaint at face value, it cannot be said that we are confronted with circumstances similar to those presented in *Brandenberg*, where the intervening acts were wholly independent of the alleged predicate acts. LDS customers, of course, were the direct victims of the defendants' scheme to fraudulently inflate their telephone bills. Given the opportunity to engage in discovery, however, Mid Atlantic may be able to show that while the scheme was initially aimed only at defrauding LDS customers, Rice broadened the sweep of the intrigue to include Mid Atlantic as a direct target (i.e., to obtain an unfair competitive advantage in recruiting Mid Atlantic customers). Discovery might or might not reveal that the artificially low billings were purposely devised to lead to harm to Mid Atlantic.

A finding of proximate cause in such a situation would not be at odds with the Supreme Court's holding in *Holmes*, since Mid Atlantic is not seeking to vindicate the rights of its former customers who may have been offered fraudulently low rates. Furthermore, Mid Atlantic's injuries, as alleged, are not derivative of any losses suffered by its former customers. Rather, it claims distinct and independent injuries: lost customers and lost revenue due to the necessity of offering lower rates to match LDS's fraudulent ones.[8] At this point, these claims are not established, but they are alleged in the complaint, and the plaintiff should have the opportunity to develop support for its claims through discovery. The district

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[8] LDS and Rice draw our attention to a district court opinion in *Lifschultz Fast Freight v. Consolidated Freightways Corp.*, 805 F.Supp. 1277 (D.S.C.1992), *aff'd.*, 998 F.2d 1009 (4th Cir.), *cert. denied*, —— U.S. ——, 114 S.Ct. 553, 126 L.Ed.2d 454 (1993). In that case, the plaintiff, a defunct trucking company, had sued its former competitors under RICO, charging mail and wire fraud as predicate acts. The plaintiff had accused the defendants of sending misleading tariff reports to rate bureaus, competitors, and the Interstate Commerce Commission and claimed that it was driven out of business as a result of this fraud. Acting with the benefit of full discovery, the district court first ruled that there was no evidence to support the claims of mail and wire fraud. It then ruled that any link between the alleged violations and the injury was at best remote and tenuous. *Lifschultz Fast Freight*, 805 F. Supp. at 1290-91. "Any harm from the alleged conspiracy would be purely contingent on how the rate bureaus and the ICC acted based on the alleged predicate acts and then the customers' taking action based on the ICC action." *Id.* at 1291. We affirmed in an unpublished opinion, *Lifschultz Fast Freight v. Consolidated Freightways Corp.*, No. 92-2523, 1993 WL 241742, at *1, 1993 U.S.App. LEXIS 16974, at *3 (4th Cir. July 6, 1993) (per curiam), relying in part on the district court's finding that the alleged predicate acts were not part of a scheme to defraud another of money or property. Here, without benefit of discovery, we are unable to conclude that the alleged mail and wire fraud committed by LDS and Rice were not part of a scheme to defraud Mid Atlantic of money such that Mid Atlantic's injuries could not have been proximately caused by LDS. It is therefore premature to address whether reasoning in *Lifschultz* compels a result in this dispute.

court, after discovery, will be in a better position to consider "such factors as the foreseeability of the particular injury, the intervention of other independent causes, and the factual directness of the causal connection." *Brandenburg,* 859 F.2d at 1189.

LDS and Rice argue that summary judgment is appropriate on an alternative ground. They contend that Mid Atlantic was aware of LDS's use of the fraudulent billing program and how that program enabled LDS to offer artifically low rates; therefore, Mid Atlantic could not have relied on LDS's proffered lower rates in setting its own rates. Absent reliance, Mid Atlantic could not bring a RICO claim under § 1964(c). This argument is predicated on *Brandenburg* where we stated: "[W]hile . . . it is not necessary to establish detrimental reliance by the victim in order to make out a violation of the federal mail fraud statute, such reliance is necessary to establish injury to business or property 'by reason of' a predicate act of mail fraud within the meaning of § 1964 (c)." *Brandenburg,* 859 F.2d at 1188 n. 10 (citation omitted). Because the district court based its proximate cause determination on the Supreme Court's decision in *Holmes,* it did not resolve the reliance issue. In light of the factual uncertainties surrounding Mid Atlantic's allegations of solicitation of its customers, resolution of the reliance issue should be deferred until completion of discovery on remand.

In sum, we hold that the district court abused its discretion in denying Mid Atlantic's request for discovery to establish support for its claim that it was an intended target of LDS's fraudulent scheme. Summary judgment is vacated and the case is remanded for action consistent with the views expressed in this opinion.

VACATED AND REMANDED WITH INSTRUCTIONS.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. K-92-370

MID-ATLANTIC TELECOM, INC.

v.

LONG DISTANCE SERVICE, INC., *et al.*

MEMORANDUM AND ORDER

(1) This Court held an on-the-record hearing in chambers in this case on January 7, 1993. At the conclusion of that hearing, counsel for plaintiff stressed the need for this Court carefully to consider the impact of *Schiffels v. Kemper Financial Services, Inc.* 978 F.2d 344 (7th Cir. 1992). As a result, this Court afforded to the parties the opportunity to file further legal memoranda. Thereafter, counsel for both sides availed themselves of that opportunity. After review of all findings in this case and of the entire record in this case, this Court concludes that defendants are entitled to the granting of their pending motion for summary judgment. In the first place, there is no conspiracy between the corporate defendant and defendant Rice under the undisputed facts in this case. In the second place, the standards established by the Supreme Court of the United States in *Holmes v. Securities Investor Protection Corp.*, —— U.S. ——, 112, S. Ct. 1311 (1992), in which the Supreme Court set forth outer limits of proximate cause, preclude, in this Court's view, plaintiff from seeking the damages which plaintiff claims in this case. *Schiffels* presents a different factual and legal

situation than was presented in *Holmes,* as the Seventh Circuit itself has indicated in *Schiffels.*

(2) Under the circumstances, for the reasons previously stated by this Court during the on-the-record proceeding on January 7, 1993, and by defendants in their several filings in this case, this Court is today entering a separate Order, granting summary judgment for defendants.

(3) Copies of this Memorandum and Order are being mailed today to counsel of record.

(4) It is so ORDERED this 10th day of March, 1993.

/s/ F.A. Kaufman
Senior United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. K-92-370

MID-ATLANTIC TELECOM, INC.

v.

LONG DISTANCE SERVICE, INC., *et al.*

REVISED ORDER

Judgment is hereby entered for defendants with prejudice in connection with all claims stated in this case by plaintiff pursuant to this Court's federal, non-diversity jurisdiction. This Court hereby declines to exercise supplemental jurisdiction over plaintiffs' state law claims in this case, and dismisses all such claims without prejudice. It is so ORDERED this 21st day of March, 1993.

/s/ F.A. Kaufman
Senior United States District Judge

APPENDIX D

Filed April 21, 1994

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-1458
CA-92-370-K

MID ATLANTIC TELECOM, INCORPORATED,
Plaintiff-Appellant
v.

LONG DISTANCE SERVICES, INCORPORATED, a/k/a Long Distance Service of Washington, Incorporated; RICHARD J. RICE
Defendants-Appellees

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellees filed a petition for rehearing with suggestion for rehearing in banc.

Judges Sprouse, Judge Wilkins and Judge Williams voted to deny the petition for rehearing.

A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Judges Russell, Widener and Wilkinson voted to rehear the case in banc, and Judges Ervin, Hall, Phillips, Murnaghan, Wilkins, Niemeyer, Hamilton, Luttig, Williams, Michael and Sprouse voted against rehearing in banc.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Sprouse for the Court.

FOR THE COURT,

/s/ Bert M. Montague
Clerk

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-7

LONG DISTANCES SERVICES OF WASHINGTON, INC. and RICHARD J. RICE,

Petitioners

v.

MID ATLANTIC TELECOM, INC.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including August 19, 1994.

/s/ William H. Rehnquist
Chief Justice
of the United States

Dated this 6th day of July, 1994.

APPENDIX F

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT
18 U.S.C. §§ 1961-1968

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), section 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 2314 and 2315 (relating to interstate transportation of stolen property), section 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code,

section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

. . .

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

§ 1964. Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

APPENDIX G

MAIL AND WIRE FRAUD
18 U.S.C. §§ 1341, 1343

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than

$1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

No. 94-319

(2)

Supreme Court, U.S.
FILED
SEP 19 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

LONG DISTANCE SERVICE OF WASHINGTON, INC. and RICHARD J. RICE,

Petitioners,

vs.

MID ATLANTIC TELECOM, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Can a business competitor state a RICO claim against another business and its principal which committed wire and mail fraud against the competitor's customers with the intent to cause those customers to leave the competitor, cause financial injury to the competitor and put the competitor out of business, where such injury to the competitor was a foreseeable consequence of the predicate acts of wire and mail fraud?

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No. 94-319

In The

Supreme Court of the United States

October Term, 1994

LONG DISTANCE SERVICE OF WASHINGTON, INC. and RICHARD J. RICE,

Petitioners,

vs.

MID ATLANTIC TELECOM, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, Mid Atlantic Telecom, Inc. ("Mid Atlantic"), respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners, Long Distance Service of Washington, D.C., Inc. ("LDS") and Richard J. Rice ("Rice").

COUNTERSTATEMENT OF THE CASE

This action commenced on February 6, 1992 when Mid Atlantic Telecom, Inc., a resale common carrier filed a Complaint alleging that LDS another resale common carrier and its President, violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, tortiously interfered with the contractual and business relationships of Mid Atlantic and engaged in unfair competition.

Mid Atlantic filed an Amended Complaint after LDS and Rice moved to dismiss the Complaint. Therein, it was alleged that LDS, at the direction of Rice, had developed a computer billing program which allowed them to randomly add minutes to the calls made by their customers. The effect of this was to inflate the length of time of the calls made, thereby increasing LDS's revenues. (Amended Complaint at Paragraphs 12, 13, 15). LDS and Rice then embarked on a deliberate campaign to target Mid Atlantic's customers, lured them with false representations of lower rates causing many customers to leave Mid Atlantic, and reduced Mid Atlantic's revenues from those customers and from customers which Mid Atlantic retained by matching LDS's false rates. (Amended Complaint at Paragraphs 14, 17, 20, 25, 26). It was further alleged that LDS also lured away Mid Atlantic's wholesale customers causing further lost revenues. (Amended Complaint at Paragraph 19). LDS and Rice intended to injure Mid Atlantic and put it out of business. (Amended Complaint at 20, 22). Of course, LDS and Rice also intended to and did enrich themselves both by obtaining the additional customers and by receiving the additional revenues earned through the fraudulent billing scheme. Mid Atlantic sought damages of $1,500,000 in each count, trebled to $4,500,000 along with attorneys' fees in Count One.

On March 17, 1992, after service of the Complaint, but prior to filing the Amended Complaint, Mid Atlantic served a Document

Request on LDS. *See* Notice of Service of Request for Production of Documents. Ten days later LDS and Rice moved to dismiss the Complaint. Mid Atlantic responded by filing the Amended Complaint and opposing the Motion to Dismiss. LDS and Rice then moved to dismiss the Amended Complaint or for Summary Judgment, filed affidavits claiming that employees of Mid Atlantic had knowledge of the alleged scheme, could not show reliance and that Mid Atlantic was not a competitor of LDS. They moved for a stay of discovery. Mid Atlantic opposed the motion filed affidavits and argued that it was entitled to discovery before the Court should consider the summary judgment request.

Without allowing Mid Atlantic to take discovery, the lower court granted LDS and Rice's motion on March 10, 1993, holding that "the standards established by the Supreme Court of the United States in *Holmes v. Securities Investor Protection Corp.*, __ U.S. __, 112 S. Ct. 1311 (1992), in which the Supreme Court set forth the outer limits of proximate cause, preclude, in this Court's view, plaintiff from seeking the damages which plaintiff claims in this case." (App. 11a). In a Revised Order of March 21, 1993, the court declined to exercise supplemental jurisdiction over Mid Atlantic's state law claims and dismissed them without prejudice. (App. 13a).

The Fourth Circuit vacated the trial court's grant of summary judgment, finding that the alleged solicitations of Mid Atlantic's customers by Rice and LDS could have been the proximate cause of Mid Atlantic's injuries. (App. 8a). The unanimous panel hearing the case concluded that "A finding of proximate cause in such a situation [as alleged by Mid Atlantic that Rice and LDS included Mid Atlantic as a direct target] would not be at odds with the Supreme Court's holding in *Holmes*, since Mid Atlantic is not seeking to vindicate the rights of its former customers who may have been offered fraudulently low rates. Furthermore, Mid Atlantic's injuries, as alleged, are not derivative of any losses suffered by its former customers. Rather, it claims distinct and

independent injuries; lost customers and lost revenue due to the necessity of offering lower rates to match LDS's fraudulent ones." (App. 9a). The court further determined that the lower court abused its discretion in granting summary judgment before Mid Atlantic had the opportunity to develop support for its claims through discovery. (App. 9a). The Fourth Circuit did not reach the reliance issue. (App. 10a). Only three of the fourteen active judges of the Fourth Circuit voted to rehear the case in banc. None of the judges in the panel hearing the case wanted to rehear the case. (App. 14a).

SUMMARY OF THE ARGUMENT

I. In *Holmes v. Securities Investor Protection Corp.*, __ U.S. __, 112 S. Ct. 1311 (1992), this Court held that in order for a person to assert a claim under the RICO Act his injuries must have been proximately caused by the predicate acts of the defendants. The Court explained that various factors must be considered by the court in determining whether there is proximate cause, so that one whose injuries are contingent and remote cannot recover. The court below applied the various factors generally used to determine that under the allegations in the Amended Complaint, Mid Atlantic's injuries were proximately caused by LDS and Rice's predicate acts of mail and wire fraud.

The decision in *Holmes, supra,* does not preclude a finding of proximate cause. The Court did not restrict recovery under RICO only to those persons who received a fraudulent wire or mailing. It sought merely to eliminate from the universe of plaintiffs those persons whose harm flowed merely from misfortunes visited upon them by defendant's acts aimed at other persons and with other intended victims.

II. LDS and Rice have failed to identify any decision of any other court of appeals which is inconsistent with the decision below. The courts of appeal which have considered the issue of

proximate cause under the RICO Act since *Holmes* have applied the factors in similar factual situations to that presented herein in precisely the same manner as did the Fourth Circuit.

III. This case does not present an issue before this Court as to whether the activities of LDS and Rice constitute wire or mail fraud. The Amended Complaint contains all of the necessary allegations to state a claim for wire or mail fraud against LDS and Rice. However, Mid Atlantic is not seeking recovery for wire or mail fraud committed against it; it is seeking recovery for injuries to its business or property suffered by reason of LDS and Rice's alleged predicate acts of mail and wire fraud. That is all that is required to state a RICO claim.

REASONS FOR DENYING THE WRIT

I.

THE FOURTH CIRCUIT PROPERLY APPLIED THE PRINCIPLES OF PROXIMATE CAUSE.

In *Holmes v. Securities Investor Protection Corp.*, __ U.S. __, 112 S. Ct. 1311, 1318 (1992), the Supreme Court held that for there to be liability by a defendant to a particular plaintiff under the RICO act the plaintiff must show that its injuries were proximately caused by defendant's acts explaining that "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." Therein, this Court concluded that the injuries suffered by the broker-dealers' customers were merely derivative of the injuries suffered by the investment firms themselves and refused to find that SIPC, let alone the nonpurchasing customers who lost money when the broker-dealers became insolvent, was proximately injured by the perpetrators of the stock manipulation scheme, "since only the intervening insolvency" of the broker-dealers connected the RICO

"conspirators' acts to the losses suffered for which recovery was sought." *Id.* at 1319.

LDS and Rice try to read a restriction into *Holmes* which does not exist. Nowhere in *Holmes* does this Court state that only persons who were the victims of the wire and mail fraud can sue under RICO. Such a reading would not only render without meaning the requirement that a plaintiff must show that he was injured "by reason of" the predicate acts of racketeering activity but would reduce RICO to a private cause of action available only to persons who were actually defrauded by wire or mail communications directed to them. That does not mean, however, that there is no proximate cause and that Mid Atlantic was not injured in its "business or property by reason of" LDS and Rice's acts of wire and mail fraud. 18 U.S.C. § 1964(c).

In her concurring opinion in *Holmes,* Justice O'Connor, citing to the Supreme Court's previous rulings giving the RICO act a broad sweep, including *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479 (1985), explained that the statutory terms "by reason of" "operate . . . to confine RICO's civil remedies to those whom the defendant has truly injured in some meaningful sense." 112 S. Ct. at 1323. Justice O'Connor further explained that the proximate cause analysis does not preclude a nonseller or nonpurchaser of securities from being RICO plaintiffs. 112 S. Ct. at 1323-24. The act does not contain any purchaser/seller standing requirement. 112 S. Ct. at 1323.

Moreover, this Court has made it clear that a competitive injury, such as that to Mid Atlantic, is clearly the type of injury within the protection of the RICO Act. In *Sedima, S.P.R.L. v. Imrex Co., Inc.,* 473 U.S. 479 (1985), this Court rejected the trial court's restriction allowing RICO claims only by those who suffer a racketeering injury or a competitive injury.

This Court recognized in *Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 535-36 (1983), that common law proximate cause cannot be subject to a "precise test", but should instead be determined by looking at previously decided cases which "identify factors that circumscribe and guide the exercise of judgment." The court must look at a number of factors, including the intent to cause the harm, the nature of the injury, the purpose of the Act at issue, and the directness or indirectness of the injury. 459 U.S. at 537-40. The court below looked at these very factors. In distinguishing the facts of this case from its earlier decision in *Brandenburg v. Seidel,* 859 F.2d 1179 (4th Cir. 1988), the Fourth Circuit Court first stated that unlike in *Brandenburg,* the intervening acts herein were not wholly independent of the alleged predicate acts, since it was alleged that while the scheme may only have been initially aimed at defrauding LDS customers, Mid Atlantic was a direct target. (App. 8a). The court then explained that unlike the situation in *Holmes,* Mid Atlantic is not seeking to vindicate the rights of its former customers, and its losses "are not derivative of any losses suffered by its former customers." (App. at 9a). Instead, Mid Atlantic claims "distinct and independent injuries" due to LDS's fraud. (App. at 9a).

Contrary to the Petition, the Fourth Circuit's decision was not inconsistent with *Holmes, supra* or *Brandenburg, supra.* In *Brandenburg,* the Fourth Circuit, consistent with the common law, held that in determining whether a particular set of facts establish proximate cause, the court should make a determination as a matter of law, "taking into consideration such factors as the foreseeability of the particular injury, the intervention of other independent causes, and the factual directness of the causal connection." 859 F.2d at 1189. Therein, the Fourth Circuit found as a matter of law that the misrepresentations allegedly made by the defendants were not "so significant and important a cause" of plaintiffs' loss that they should be held responsible, concluding that they were not

"injured in [their] business or property by reason of [the defendants' alleged] violation of Sec. 1962." 859 F.2d at 1189-90.[1] In this case, the Fourth Circuit conducted precisely the same analysis it conducted in *Brandenburg*. Under Mid Atlantic's allegations, which must be accepted as true, the court found that Mid Atlantic's injuries could have been proximately caused by LDS and Rice's acts. (App. at 9a).

While a conclusion of proximate cause is a legal conclusion it is one that is highly fact specific. As this Court stated in *Associated General Contractors*, 459 U.S. at 536, there are an "infinite variety of claims that may arise" which "make it virtually impossible to announce a black-letter rule that will dictate the result in every case." The court below properly applied the factors set forth by this Court to guide it in the exercise of its judgment in deciding that if the allegations proved true, a remedy is available to Mid Atlantic under the RICO Act.

In *Holmes*, this Court was concerned with the risks of multiple recoveries and persons "who complained of harm flowing merely from misfortunes visited upon a third person by the defendant's acts." 112 S. Ct. at 1318. That is not the situation here. There is no risk of multiple recovery and the harm to Mid Atlantic is not "merely" misfortunate. The alleged harm to Mid Atlantic is deliberate and distinct from that to the customers. The claim asserted by Mid Atlantic against LDS and Rice is clearly allowed under this Court's decision in *Holmes*.

---

1. In *Holmes*, 112 S. Ct. at 1317 n. 11. This court noted *Brandenburg* as a case requiring proximate causation under RICO.

II.

THE DECISION BELOW IS NOT INCONSISTENT WITH THE DECISIONS OF OTHER COURTS OF APPEAL IN ITS APPLICATION OF PROXIMATE CAUSE FACTORS.

LDS and Rice claim that in the circuits there is a lack of uniformity "in their notions of what proximate cause entails." (Petition at 5). There is no such lack of uniformity. By its nature, a determination of whether proximate cause exists is a case specific determination. In the published appellate decisions applying "proximate cause" standards to RICO claims, the courts have reviewed those factors enumerated by this Court in *Holmes* and *Associated General Contractors,* and in cases presenting scenarios similar to that presented herein the courts have found proximate cause to exist. For example, in *Bieter Co. v. Blomquist,* 987 F.2d 1319, 1326 (8th Cir. 1993), the court found that a competitor developer was proximately and directly injured by defendants' bribery of city officials because the bribery was intended to prevent plaintiff's proposed development from receiving the necessary approval and to assure approval of a competing development. Similarly, in *Standardbred Owners Association v. Roosevelt Raceway Associates,* 985 F.2d 102, 104 (2d Cir. 1993), the court found that horse owners and their organization's injuries were proximately caused by the racetrack owner's fraud in obtaining bonds from the town when the owner intended to close the track since their injury was not derivative of any injury sustained by the revenue authority and was direct, inevitable and must have been anticipated. In *Schiffels v. Kemper Financial Services, Inc.,* 978 F.2d 344 (7th Cir. 1992), the court held that a person can state a claim under § 1962(c) even if the RICO predicate acts of fraud were not committed against the person so long as the complaining person's injury was caused "by reason of" the predicate acts.

LDS and Rice have not identified any dispute among the circuits as to the application of the proximate cause factors under the RICO Act. The infinite variety of fact situations make it impossible to set down a precise black-letter rule to determine whether there is proximate cause. Instead, the court below evaluated the various factors necessary to determine whether the specific facts alleged herein establish proximate cause as a matter of law.

III.

THERE IS NO ISSUE PRESENTED AS TO WHETHER LDS AND RICE COMMITTED MAIL OR WIRE FRAUD.

LDS and Rice properly point out that where the RICO predicate acts are violations of the mail and wire fraud statutes, a plaintiff must show that the defendants "engaged in a scheme to defraud, that they used the mails and wires in furtherance of the scheme, and that they acted with the specific intent to defraud." (Petition at 7). Here, all of those facts are alleged in the Amended Complaint. LDS and Rice's error is in their conclusion that since LDS and Rice sent no fraudulent information to Mid Atlantic through the wires or the mails, and since Mid Atlantic could make no wire or mail fraud claim (hypothetically assuming a private cause of action for violation of 18 U.S.C. §§ 1341, 1343), Mid Atlantic can assert no RICO claim. However, 18 U.S.C. § 1964(c) provides for recovery by "any person injured in his business or property by reason of a violation of section 1962". Mid Atlantic is claiming injury by reason of LDS and Rice's predicate acts of wire and mail fraud. It is not claiming and need not claim that LDS and Rice sent any wire or mail communications to it to maintain its RICO claim. Significantly, unlike the situation in *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786 (1st Cir. 1990), the scheme herein was intended to deceive both customers and Mid

Atlantic and was a scheme to defraud both Mid Atlantic and its customers of money. In *McEvoy,* no one was deceived by the wire and mail fraud and no one was defrauded of money or property.[2]

Mid Atlantic has alleged injury to its business or property suffered by reason of LDS and Rice's alleged predicate acts of mail and wire fraud. A proper RICO claim has been stated.

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2. *Lancaster Community Hospital v. Antelope Valley Hospital District,* 940 F.2d 397, 406 (9th Cir. 1991), *cert. denied,* ___ U.S. ___, 112 S. Ct. 2268 (1992), also cited by LDS and Rice, is inapposite and lends nothing to their argument. Therein, the court held that plaintiff failed to specify facts relating to the alleged use of the mails as required under Federal Rule of Civil Procedure 9(b). That is not an issue here. *Midwest Grinding Co. v. Spitz,* 976 F.2d 1016 (7th Cir. 1992), also cited by LDS and Rice, held that plaintiff had not alleged fraud with the required specificity and had not alleged the continuity required to make out a pattern of racketeering activity. Once again, that is not at issue in this case.

CONCLUSION

The decision below does not conflict with *Holmes v. Securities Investor Protection Corp.*, ___ U.S. ___, 112 S. Ct. 1311 (1992), and there is no dispute among the circuits which would justify the grant of the petition for writ of certiorari. Moreover, there are no significant issues of general application in that the application of the proximate cause standards in any case are highly fact specific. Accordingly, this Court should not issue the requested writ of certiorari.

Respectfully submitted,

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